IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 32 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

AMBA KALA KOLI

Versus

PATEL DHARAMSHI POLA BASIDA

Appearance:

Mr. P.B. Majmudar, advocate for the appellant.

CORAM: Y.B. BHATT J.

Date of Decision: 15-03-1996

ORAL JUDGEMENT

1. This is a regular appeal under section 96 of the Civil Procedure Code by the original defendant of Special Civil Suit No.141/77, challenging the decree passed against him by the Civil Judge (Senior Division), Rajkot.

2. The pertinent facts, in brief, leading to the present appeal are as under:

2.1 The respondent-plaintiff had filed a suit against the defendant to recover a sum of Rs.8000/-, advanced by

the plaintiff to the defendant by way of a loan, Rs.2880/- by way of interest at the rate of 12% per annum and Rs.20/- by way of notice charges.

2.2 The case of the plaintiff as pleaded in the plaint and as sought to be made out by way of evidence on record was to the effect that the defendant was in need of money and had therefore borrowed Rs.8000/- in cash from the plaintiff on 23rd September 1974. The defendant had on the said day executed a promissory note in favour of the plaintiff. The said amount had been borrowed for the purpose of agricultural work, for household expenses, etc., and the defendant had further agreed to pay interest on the said amount at the rate of 12% per annum. The rate of interest has also been agreed to and stated in the said promissory note.

2.3 Since the defendant did not pay the amount, nor make any payment towards the said dues of the plaintiff, the latter had served upon the defendant the suit notice dated 29th August 1977, setting out his claim and demand in respect of the said payment. The defendant had received the notice, but had not replied thereto nor had he denied the plaintiff's demand. Even after receipt of the notice the defendant failed to make any payment whatsoever and the plaintiff was, therefore, obliged to file the suit.

3. It is pertinent to note that the plaintiff had set out in the plaint the different heads constituting the aggregate of the suit claim viz.Rs.8000/- being the amount of the loan evidenced by the suit promissory note, Rs.2880/- as interest at the rate of 12% per annum from the date of the promissory note till the date of filing of the suit and notice charges of Rs.10/-. The aggregate of this claim would come to Rs.10900/-. However, the suit claim is valued at Rs.11000/-. The difference of Rs.100/- (excess claim) has not been explained by the plaintiff, and has apparently escaped the attention of the trial court.

4. The defendant appeared and resisted the suit by filing his written statement at Exh.11 and contended inter alia that the plaintiff's suit is false, barred by limitation, that the court had no jurisdiction to hear and decide the suit, that the defendant had not borrowed the alleged amount of Rs.8000/-, that he had not executed the suit promissory note in favour of the plaintiff, that he had not agreed to pay interest at the rate of 12%, etc. The defendant further contended that about six years ago on account of scarcity and famine conditions he

was in fact in need of money, and the plaintiff had, therefore, given him a bale of grass worth Rs.700/- and Rs.100/- in cash. Thus, the plaintiff had advanced Rs.800/- to the defendant six years ago. In this context, the defendant contended that he has long ago repaid this amount of Rs.800/- to the plaintiff together with interest, but the plaintiff has failed to issue a receipt in respect of such payment. Moreover, according to the defendant, when the plaintiff had advanced Rs.800/- as aforesaid, he had obtained the thumb impression of the defendant on a writing by representing to the defendant that it was a document of loan for Rs.800/-. The defendant further contended that the suit is barred by the relevant provisions of the Bombay Money Lenders" Act, since the plaintiff is doing the business of money lending without the necessary licence.

5. On this set of pleadings between the parties the trial court framed issues at Exh.12, and after recording evidence and hearing the parties, recorded findings of fact in favour of the plaintiff on all the relevant issues and passed a decree in favour of the plaintiff and against the defendant in the sum of Rs.11000/-. It is to be noted here that the trial court has not noted or explained as to how decree for Rs.11000/- is passed although the suit claim actually amounts to Rs.10900/-.

6. On the specific issues framed at Exh.12, the trial court found that the plaintiff had proved that the defendant had borrowed Rs.8000/- on 23rd September 1974, and that the defendant had passed a promissory note in favour of the plaintiff on that account, that the said pronote is legal and valid, that the plaintiff was entitled to recover interest as claimed, that the court had jurisdiction to hear the suit, that the suit claim is not barred by limitation, and that the suit is not hit by the provisions of the Bombay Money Lender's Act.

7. The learned counsel for the appellant has mainly contended that the appreciation of evidence on the part of the trial court is not rational and reasonable and would not justify the factual findings of fact recorded against the defendant by the trial court. With these contentions in mind learned counsel has taken me through the appropriate evidence on record.

8. The case of the plaintiff as set out in the plaint and in the oral evidence is that the defendant had borrowed Rs.8000/- in cash on 23rd September 1974 and in pursuance thereof had executed a suit promissory note. As against this the defendant's contention is that he had

not borrowed Rs.8000/-, but he had taken from the plaintiff about six years ago a bale of grass worth Rs.700/- and a loan of Rs.100/- in cash, and it was in respect of this transaction that the plaintiff had taken the defendant's thumb mark on a writing, and although this loan of Rs.800/- had been repaid by the defendant, the plaintiff had failed to issue the necessary receipt. Thus, according to the defendant, the writing which pertained to the transaction of Rs.800/- appears to have been altered and made out for the sum of Rs.8000/-.

9. The plaintiff has deposed at Exh.19, where his deposition is explicit and specific. He has not been effectively shaken in his cross-examination. He has specifically deposed that the defendant was in need of money at the relevant point of time and had therefore approached him and requested a loan of Rs.8000/- on 23rd September 1974. The plaintiff had agreed to give the said loan, and had asked the defendant to come later on in the evening on the same day. Thereafter on that evening the plaintiff had given the defendant Rs.8000/in cash, and the defendant had put his thumb mark on the suit promissory note, which had been kept ready by the plaintiff and which had been drafted by one Rajnikant Vyas (the clerk of his advocate). The suit pronote has thus been proved at Exh.21. The plaintiff has further deposed that one Kanjibhai Dodia was present when this loan was advanced, and was also present when the defendant has put his thumb mark below the suit pronote, and thus the said Kanjibhai Dodia had endorsed the pronote at Exh.21 as an attesting witness. In fact the plaintiff has given further details of the transaction by pointing out that the plaintiff had in fact handed over the amount of Rs.8000/- to the said Kanjibhai Dodia who was asked to count the currency notes and after the same were counted by the said Kanjibhai Dodia, the currency notes were handed over to the defendant by Kanjibhai Dodia in the presence of the plaintiff. Kanjibhai Dodia has been examined by the plaintiff and his deposition is at Exh.25. The said Kanjibhai Dodia has fully endorsed all the facts asserted by the plaintiff in his own deposition, and has also withstood the test of cross-examination. The said Kanjibhai Dodia has also in his deposition reiterated the plaintiff's case that after the currency notes had been counted by himself and handed over to the defendant, the defendant had put his thumb mark on the said promissory note in his presence, and it was for this reason that he had endorsed the said promissory note as an attesting witness. Thus, on this evidence the trial court was perfectly justified in coming to the conclusion that the suit promissory note

was duly proved by the plaintiff, as also the fact that it was for valid consideration.

10. As against this evidence, there is nothing but the bare denial on the part of the defendant. It is also pertinent to note that the defendant has not alleged anything against the said attesting witness Kanjibhai Dodia.

11. Furthermore, there is other evidence on record which would corroborate the aforesaid evidence of the plaintiff. The plaintiff had served the defendant with the suit notice dated 20th August 1977, a copy whereof is on record at Exh.22. The defendant had duly received this suit notice by registered post under acknowledgment receipts produced at Exhs.23 and 24. The addresses of his Wadi at Rajkot and of his residence at village Anandpur are also the correct addresses. In this context it is pertinent to note that the defendant has denied the receipt of the said suit notice in his written statement, but at the state of oral evidence he has not been able to deny on oath that the acknowledgment receipts at Exh.23 and 24 bear his thumb mark. Thus, although the defendant had received the suit notice, it is significant to note that he has chosen not to give any reply thereto and at least at that stage he has chosen not to raise the theory of having taken only a bale of grass worth Rs.700/- and Rs.100/- in cash six years ago, and repayment of the same without obtaining a receipt. Obviously this is a theory concocted by the defendant only at the stage of filing the written statement.

11. The defendant's version cannot be accepted for the simple reason that firstly this is a theory raised for the first time only in the written statement, secondly because even according to his own theory he had no receipt passed by the plaintiff in respect of the so-called transaction and repayment of Rs.800/-, and thirdly because although according to him he had repaid Rs.800/- he had not made any demand from the plaintiff for a receipt.

11.1 The defendant claimed that the said amount of Rs.800/- was repaid to the plaintiff in the presence of one Vasta Dahya who is examined by the defendant at Exh.37. The deposition of the of the said Vasta Dahya does not inspire any confidence inasmuch as although he tries to corroborate the defence version of the defendant, he is also obliged to admit that he is a field labourer engaged by the defendant.

11.2 Thus, when we examine the conduct of the defendant, firstly in not insisting upon a receipt before discharging his debt of Rs.800/-, secondly in not making a written demand for such receipt at a later stage, and thirdly in not informing the plaintiff and raising this contention after receipt of the suit notice, it becomes obvious that the defendant's defence is a mere concoction.

13. The factual aspects and the appreciation of evidence discussed hereinabove are the only substantial contentions raised by learned counsel for the appellant.

14. The findings on other issues which have been held against the defendant and in favour of the plaintiff have incidentally been referred to by the learned counsel for the appellant. I, however, do not propose to discuss these findings in respect of issue No.2A, Issue Nos.3, 4, 5 and 6, inasmuch as I am in agreement with the findings recorded by the trial court in respect thereof. In view of the clear-cut and unassailable findings in respect of these issues, I do not consider it necessary to reiterate and rediscuss the same herein.

15. In view of the aforesaid evidence on record, the trial court was fully justified in decreeing the plaintiff's suit with interest and also allow Rs.20/- by way of notice charges.

16. However, one aspect requires to be noted. Throughout judgement the suit claim has been referred referred as consisting of three subheads: (1) Rs.8000/- by way of loan, (2) Rs.2880/- by way of interest at 12% per annum and (3) Rs.20/- by way of notice charges. However, what the trial court has failed to appreciate is that the aggregate of these three heads amounts to only Rs.10900/- and not Rs.11,000/-. However, the trial court has decreed the plaintiff's suit for Rs.11,000/-, possibly because it failed to notice the error in calculation. Another possibility behind this error could be that the suit claim as stated at the head of the plaint is Rs.11,000/-.

17. However, since the correct aggregate of the plaintiff's claim is Rs.10,900/-, the suit could have been decreed only for the said sum.

18. The trial court decree is, therefore, required to be modified to the limited extent that the plaintiff's suit is decreed for Rs.10,900/- instead of Rs.11,000/-. The rest of the decree requires to be confirmed.

19. Accordingly the present appeal succeeds in part as stated hereinabove. There shall be no orders as to costs. Decree accordingly.

******